IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re PETER SAKARIAS, on Habeas Corpus.	)	Supreme Court No. S082299
In re TAUNO WAIDLA, on Habeas Corpus.	)	Supreme Court No. S102401

PETITIONER PETER SAKARIAS'S RESPONDING BRIEF

ON THE MERITS

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INTRODUCTION

Pursuant to this Court's order of January 15, 2003, the Los Angeles Superior Court held an evidentiary hearing on October 28, 2003. Judge Thomas L Willhite, Jr. presided and filed findings of fact in this Court. On December 16, 2003, the Court invited all parties to file simultaneous objections to Judge Willhite's report and briefs on the merits. That same order provided for simultaneous responsive briefs.

The state filed its brief on the merits on March 18, 2004. Before responding to the arguments set forth in that brief, it is worth noting what is no longer at issue in this case.

The claim that the prosecutor violated due process by arguing inconsistent and mutually-exclusive factual positions at the trials of Tauno Waidla and Peter Sakarias was first raised by Sakarias on direct appeal. The state's response to this claim has evolved over time. Initially, the state claimed the prosecutor's arguments were not inconsistent. Next, the state admitted the prosecutor took inconsistent positions in the two trials but did so inadvertently. Now, the state accepts Judge Willhite's finding that the prosecutor intentionally argued inconsistent positions in order to gain a tactical advantage; the state concedes that it "does not take exception to the factual findings of the referee's report." (Respondent's Exceptions to the Referee's Report and Brief on the Merits ("RB") at 4.)

These findings are stark. Judge Willhite found that Ipsen **did** present inconsistent theories at the two trials and it was **not** an accident. According to Judge Willhite, Ipsen intentionally argued inconsistent positions in the two trials in order to "maximize the portrayal of each defendant's culpability." (Referee's Report 22.) Ipsen "deliberately refrained" from asking Dr. Ribe about the postmortem abrasion in the Sakarias trial because "it was inconsistent with the theory of the killing Ipsen presented at the Sakarias trial." (Id. at p. 29.) Finally, Ipsen had "strong reason to believe" his argument to the Sakarias jury was false because it was inconsistent with "the great weight of the evidence." (Referee's Report at 27.)

Although respondent finally concedes the truth of these findings, in its brief it ignores them almost entirely, and argues only that (a) Ipsen did not present either false evidence or argument and (b) he acted in "good faith." (RB 23-24, 25-27.) Relying on the illuminating fact that Ipsen "was not present during commission of the crime," respondent argues that Ipsen could not determine who did what and could not "know" his theory in the Sakarias case was false. (RB 22-24.) Thus, according to respondent, Ipsen's acted properly because there was an evidentiary basis (albeit a slim one) for the theory he presented. (RB 14.) Finally, respondent argues that any violation was harmless as to the penalty phase because the jury would have imposed death anyway. (RB 27-29.)

The legal predicate for respondent's argument is simple. Citing four California cases, respondent argues that unless a prosecutor presents evidence or argument he knows

is false, "a prosecutor is entitled to argue, in separate trials of two or more defendants, factually inconsistent theories of the same criminal events." (RB 17.)

This response follows. As more fully discussed below, none of the cases cited by respondent actually supports the legal theory it proposes or justifies Ipsen's conduct. But even accepting respondent's theory, relief is required here. As Judge Willhite found, and as respondent concedes, the prosecutor intentionally presented a evidence and argument that he knew was contrary to the great weight of the evidence. He did so in order to maximize Sakarias's culpability in the eyes of the jury deciding whether he would live or die. That is not only the definition of a knowing presentation of false evidence/argument, but it is the essence of bad faith. Moreover, given the mitigating evidence presented at trial, the obvious difficulty the jury had in deciding the case that was presented to them, and the prosecutor's reliance on the false theory -- all facts which respondent utterly ignores -- relief is required in this case.

ARGUMENT

I. IN CONSECUTIVELY TRYING TWO DEFENDANTS FOR THE SAME OFFENSE, A PROSECUTOR MAY NOT INTENTIONALLY MANIPULATE EVIDENCE SO HE CAN PRESENT A THEORY OF THE CASE WHICH HE KNOWS TO BE AGAINST THE "GREAT WEIGHT OF THE EVIDENCE" WITH THE SOLE PURPOSE OF MAXIMIZING THE CULPABILITY OF THE DEFENDANT ON TRIAL.

According to respondent, the legal issue presented in this case has already been decided in no less than four cases. (RB 17.) Respondent argues that unless a prosecutor presents evidence or argument he knows is false, "a prosecutor is entitled to argue, in separate trials of two or more defendants, factually inconsistent theories of the same criminal events." (RB 17, citing People v. Turner (1994) 8 Cal.4th 137, 194; People v. Farmer (1989) 47 Cal.3d 888, 923; People v. Watts (1999) 76 Cal.App.4th 1250, 1260-1264; People v. Hoover (1986) 187 Cal.App.3d 1074, 1086.)

As discussed in greater detail in Argument II, infra, even accepting respondent's legal thesis, relief would be required. Judge Willhite's findings establish that at the Sakarias trial, prosecutor Ipsen presented evidence and a theory of the case which was contrary to what he knew to be "the great weight of the evidence." He did so not by accident, as he testified, but on purpose. And he did so precisely so that he could "maximize the portrayal of each defendant's culpability." (Referee's Report at 22.) This

plainly constitutes not only the knowing presentation of false evidence and argument, but bad faith as well. But even putting these points aside for the moment, none of respondent's authorities supports its legal thesis or justifies Ipsen's conduct in this case.

As an initial matter, two of respondent's four cases involve prosecutorial arguments that were **not** inconsistent. For example, in People v. Turner, supra, 8 Cal.4th 137, the defendant was charged with murder. At the prior trial of a co-defendant, the prosecutor argued that defendant and the co-defendant Scott both intended to kill. At defendant's later trial, the prosecutor again argued that defendant intended to kill but this time said Scott did not. On appeal, defendant claimed the prosecutor's change as to Scott's intent required reversal of his conviction. This Court correctly rejected the argument, noting that "according to defendant [the prosecutor] asserted in both trials that defendant was the actual killer and that Scott was an aider and abettor." (Id. at p. 94.) In other words, defendant's inconsistent theory claim was rejected because the prosecutor's argument had not changed at all as to "defendant's culpability for the crimes." (Id.)

Turner stands in sharp contrast to this case. In Turner, the guilt phase jury had to make a determination as to defendant's intent. As to this issue, the prosecutor's arguments did not change from one trial to the next. Under this circumstance, it seems obvious there could be no guilt phase error. Here, Sakarias is **not** making a guilt phase argument at all. But as to critical factual questions which the jury was required to

consider in the penalty phase, Ipsen's argument dramatically changed, not only in connection with who was dominant and who planned the offense, but their actual roles in the offense as well. Turner neither aids respondent's position nor justifies Ipsen's conduct in this case.

Nor does People v. Hoover, supra, 187 Cal.App.3d 1074 aid respondent. There, defendant was convicted of murder. At the trial of a co-defendant, the prosecutor argued that the co-defendant manipulated defendant into committing the crime. At defendant's trial, the prosecutor again argued that defendant had been manipulated but went on to argue that defendant committed the crime for financial gain. The court again rejected a guilt phase claim of inconsistent theories, noting that "nothing of the sort occurred here." (Id. at p. 1083.) Like Turner, Hoover neither aids respondent's position nor justifies Ipsen's conduct.

The third case on which respondent relies -- People v. Watts, supra, 76 Cal.App.4th 1250 -- not only fails to support the state's position, but affirmatively shows why relief is required here. In Watts, two defendants committed a robbery. One of them used a gun. At the co-defendant's earlier trial, the prosecutor argued that the co-defendant used the gun. The jury agreed and found a personal use enhancement true. At defendant's subsequent trial, the prosecutor switched theories and argued that the second defendant used the gun. This jury also agreed and found true the personal use

enhancement. On appeal, the second defendant argued this was improper. In rejecting this claim, the reviewing court noted that the evidence "support[s] the conclusion that the jury in the earlier trial was mistaken." (Id. at p. 1261.) The court also noted "there is no suggestion that the prosecutor somehow manufactured or manipulated the evidence in order to obtain a conviction in appellant's trial . . . ." (Id.) Under these circumstances, there was no error as to the prosecutor's switch in theories as to the second defendant. (Id.)

Once again, Watts does not justify Ipsen's tactics. In contrast to Watts, the evidence here does **not** "support the conclusion that the jury in the earlier trial was mistaken." (76 Cal.App.4th at p. 1261.) To the contrary, as Judge Willhite found (and respondent does not dispute), the "great weight of the evidence" supports precisely the opposite conclusion: the theory presented in the Waidla trial was correct. Equally important, and again in stark contrast to Watts, not only is there a "suggestion" that Ipsen "manipulated the evidence" in order to maximize Sakarias's culpability, **there is an explicit finding to that effect, a finding that the state does not even contest.** Watts does not immunize Ipsen's conduct here.

The last case on which respondent relies is People v. Farmer, supra, 47 Cal.3d 888. In that case, defendant was convicted of capital murder. Before defendant's trial, the state had tried a co-defendant for the offense. At closing argument in defendant's

subsequent trial, his lawyer tried to read to the jury portions of the prosecutor's closing argument in the prior case, alleging they were inconsistent with the positions taken at defendant's trial. The Court first held that because this material had never been placed in evidence, it could not be relied on in closing argument. (47 Cal.3d at pp. 922-923.) In dictum, the Court went on to observe that inconsistent arguments would be improper only if done in bad faith. (Id. at p. 923.) The Court never defined what it meant by bad faith. (Id.) Nor did the Court discuss the situation presented here -- a prosecutor intentionally manipulating the evidence to gain a tactical advantage and then denying that manipulation in post-conviction proceedings.

In short, this case presents a very unusual factual situation. According to findings which the state accepts as true, prosecutor Ipsen intentionally manipulated the evidentiary record in this case. He did so precisely so that he could maximize the portrayal of each defendant's culpability. He presented an argument in the Sakarias case which he knew was contrary to the great weight of evidence he himself had presented in the Waidla trial.

None of the four cases on which respondent relies justify Ipsen's conduct in this case. Respondent's contrary argument ignores the facts of the cases it cites and Judge Willhite's undisputed findings. A prosecutor commits misconduct and violates due process when he manipulates evidence so he can take inconsistent, irreconcilable

positions in seeking death against two defendants for the same crime.

A recent case has reached this precise result. In this regard, in his brief on the merits, petitioner cited numerous cases which condemn a prosecutor's use of inconsistent evidence and arguments. (Petitioner's Peter Sakarias's Brief on the Merits at 38-39, citing Smith v. Groose (8th Cir. 2000) 205 F.3d 1045, 1051-1052; Thompson v. Calderon (9th Cir. 1997) 120 F.3d 1045, 1058; United States v. Kattar (11th Cir. 1988) 840 F.2d 118, 128; Drake v. Kemp (11th Cir. 1985) 762 F.2d 1449, 1479 (conc. opn. of Clark, J.); Nichols v. Collins (S.D.Tex. 1992) 802 F.Supp. 66, 74, rev'd on other grounds, Nichols v. Scott (5th Cir. 1995) 69 F.3d 1255.) Only weeks ago, the Sixth Circuit Court of Appeals reached the same result in a case remarkably similar to this one, concluding that "the use of inconsistent, irreconcilable theories to convict two defendants for the same crime is a due process violation." (Stumpf v. Mitchell (6th Cir. April 28, 2004) 2004 WL 894991 at * 17.)

In Stumpf, defendant pleaded guilty to capital murder. Pursuant to Ohio law, there was a post-plea sentencing hearing to determine whether defendant would receive a death sentence. The prosecutor argued for a death sentence in part because Stumpf personally shot the victim. Defendant was sentenced to death. Later, in the trial of Stumpf's co-defendant Wesley, the prosecutor introduced evidence that it was Wesley -- **not** Stumpf -- who shot the victim. Based on this evidence, the prosecutor argued Wesley was the

actual killer. Wesley was convicted.

On appeal, Stumpf argued that the prosecutor's use of inconsistent and irreconcilable arguments violated Due Process and required that his death sentence be vacated. Citing Smith, Thompson, Drake and Nichols – the very same cases on which Mr. Sakarias relies -- the Sixth Circuit noted that because of the "Constitution's 'overriding concern with the justice of the finding of guilt,' . . . several of our sister circuits have found, or implied, that the use of inconsistent, irreconcilable theories to secure convictions against more than one defendant in prosecutions for the same crime violates the due process clause." (Id.) The Court then "join[ed] our sister circuits in finding that the use of inconsistent, irreconcilable theories to convict two defendants for the same crime is a due process violation." (Id.) In applying that rule to the penalty phase claim before it, the Court observed that defendant's specific role in the offense as the actual killer was a "substantial reason" for imposition of the death sentence. (Id. at * 20.) Because the prosecutor presented inconsistent theories on this important fact, Due Process required defendant's death sentence be vacated. (Id. at * 21-22.)

Stumpf is identical to this case. In both cases, the defendant's specific role in the offense -- and the question of whether he inflicted the fatal wound -- was an important factor in the decision to impose death. In Stumpf, it was a "substantial reason" for imposition of the death sentence. Here, as Judge Willhite himself found, "Ipsen

obviously considered infliction of the chopping wounds, especially the hemorrhagic chop wound, to be singularly important in showing each defendant's depravity." (Referee's Report at 26.) In both cases, the prosecutor presented inconsistent evidence and argument on this critical factual question.

Indeed, the facts of this case are in many ways far more egregious than in Stumpf. Judge Boggs dissented in Stumpf, noting that there was no showing the prosecutor had "cherry-picked facts" to make Stumpf appear more culpable. (2004 WL 894991 at * 25-26.) Judge Boggs would have affirmed the death sentence because, in his view, absent a showing that the prosecutor had "manipulat[ed] or select[ed] out critical evidence, due process is not violated." (2004 WL 894991 at * 27.)

In this case, of course, Judge Willhite found that Ipsen had done exactly that. And the state does not even take issue with these findings. Due process has been violated.

II. BY INTENTIONALLY MANIPULATING THE EVIDENCE SO HE COULD PRESENT A THEORY OF THE CASE WHICH HE KNEW TO BE AGAINST THE "GREAT WEIGHT OF THE EVIDENCE," AND BY DOING SO WITH THE SOLE PURPOSE OF MAXIMIZING SAKARIAS'S CULPABILITY, IPSEN ACTED IN BAD FAITH AND PRESENTED FALSE EVIDENCE.

Despite what on its face appears to be serious prosecutorial misconduct, respondent argues there is no error of state or federal law. (RB 23-27.) Respondent maintains that "a prosecutor is entitled to ask different juries to draw different inferences provided both arguments are made in good faith and [are] not based on any false evidence." (RB 27.) Relying on Ipsen's testimony at the hearing, respondent argues that Ipsen could not have **known** with certainty that his argument to the Sakarias jury was false. Therefore, Ipsen acted in good faith and did not argue falsely to the jury. (RB 23-26; Referee's Report 27.)

The argument is meritless. Judge Willhite's findings establish that Ipsen acted in bad faith and that he knowingly and intentionally misled the jury in the Sakarias trial. And the trial record itself shows that nothing in Ipsen's testimony at the 2003 evidentiary hearing justified his conduct.

A. Judge Willhite's Findings Establish That Ipsen Acted In Bad Faith.

Some cases facing the issue of inconsistent arguments have stated that the practice

is misconduct if done in "bad faith." (See, e.g., People v. Farmer, supra, 47 Cal.3d at p. 923 ["Defendant would have a valid complaint only if he could show the argument in his case was not justified by the evidence or was made in bad faith."]; Nguyen v. Lindsey (9th Cir. 2000) 232 F.3d 1236, 1240 [inconsistent positions "can violate due process if the prosecutor knowingly uses false evidence or acts in bad faith"].) Neither of these cases define "bad faith" in the context of inconsistent arguments.

Respondent latches on to this language and, without offering a definition of "bad faith" either, argues that Ipsen's argument in the Sakarias trial was made in "good faith." (RB 25-26.) Respondent's legal thesis appears to be this: as long as there is "some evidence" to support the position Ipsen took at the Sakarias trial, Ipsen acted in "good faith." Respondent's factual premise is equally simple: here, Ipsen had "some evidence" to believe the victim was alive in the bedroom, although the "great weight" of the evidence showed she was not.

As an initial matter, and regardless of how the term "bad faith" is defined for purposes of a prosecutorial misconduct claim, an inquiry into (and finding of) bad faith is not required to establish a Due Process violation. (Brady v. Maryland (1963) 373 U.S. 83, 87 [holding that Due Process claims based on suppression of evidence do not depend "on the good faith or bad faith of the prosecution."]; Giglio v. United States (1972) 405 U.S. 150, 152-154 [holding Due Process violated where prosecutor presented false

evidence even though the prosecutor did not personally know the evidence was false].) But even if this was not the case, or even if bad faith was required to establish a prosecutorial misconduct claim, neither of the two prongs of respondent's "good faith" argument could withstand analysis.

First, respondent's legal analysis is fundamentally flawed. Respondent proceeds as if a prosecutor is to be treated as any other lawyer operating in the adversary system. Entirely absent from respondent's discussion is any recognition that "[p]rosecutors are subject to constraints and responsibilities that don't apply to other lawyers." (United States v. Kojayan (9th Cir. 1993) 8 F.3d 1315, 1323.) An attorney for the government is a "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (Berger v. United States (1935) 295 U.S. 78, 88, overruled on other grounds in Stirone v. United States (1960) 361 U.S. 212.) Thus, "prosecutors remain under the solemn obligation to present evidence only if it advances rather than impedes the search for truth and justice." (People v. Seaton (2001) 26 Cal.4th 598, 649.) A prosecutor "may not become the 'architect of a proceeding that does not comport with [the] standards of justice.'" (Id. at p. 650, quoting Brady v. Maryland (1963) 373 U.S. 83, 88.)

These principles are the standard by which a prosecutor's good faith is measured. Ipsen represented the government and therefore a higher standard of conduct applied to him. A defense attorney may present exculpatory evidence even though he believes his client is guilty. (See People v. Riel (2000) 22 Cal.4th 1153, 1217.) A prosecutor, however, may not present evidence if he "seriously doubts" its accuracy. (People v. Seaton, supra, 26 Cal.4th at p. 650). Similarly, a prosecutor may not argue a theory of the case when he personally knows of facts not presented at trial that contradict that theory (Brown v. Borg (9th Cir. 1991) 951 F.2d 1011, 1015), and may not "propound inferences that [he] knows to be false, or has a very strong reason to doubt." (United States v. Blueford (9th Cir. 2002) 312 F.3d 962, 968.)

Respondent's argument also fails to recognize that Ipsen did not simply draw inconsistent inferences from a single set of circumstances. Respondent suggests Ipsen did nothing untoward because it was the jury's function to consider the evidence and decide whether Ipsen's reasoning was "logical or faulty." (RB 23.) However, respondent ignores Judge Willhite's finding that Ipsen deliberately made sure that the jury did **not** have all the evidence before it and that he intentionally manipulated the evidence precisely because he did not want the jury to see that his reasoning was faulty.

The undisputed facts establish that Ipsen made a deliberate, strategic decision to argue inconsistent positions in the two trials in order to "maximize the portrayal of each

defendant's culpability." (Referee's Report 22.) He then manipulated the evidence in the Sakarias trial and "deliberately refrained" from asking Dr. Ribe about the postmortem abrasion because he knew that fact would destroy the new theory he intended to present. (Referee's Report 29.) A prosecutor acts in bad faith when he argues a fact he knows is flatly contradicted by evidence he relied upon in an earlier proceeding, but connives to keep that crucial information from the jury. These deliberate tactics cannot be reconciled with a prosecutor's duty, as a representative of the State and as a "servant of the law," to guarantee the fundamental fairness of the judicial proceeding. (Berger v. United States, supra, 275 U.S. at p. 88; People v. Superior Court (Greer) (1977) 19 Cal.3d 255, 266.) What Ipsen did here is the very definition of "bad faith." (See Arizona v. Youngblood (1988) 488 U.S. 51, 57 (state's destruction of evidence is in bad faith where it is "intentional[] . . . to gain some tactical advantage . . . ."].)

But even if this Court were to ignore the special role traditionally afforded prosecutors in the adversary system, and accept respondent's "some evidence" theory, the state's position would still have to be rejected. The factual premise for respondent's argument -- its claim that Ipsen had "some evidence" to believe that the victim did not die in the living room -- is totally unsupported by the record. Respondent states that Ipsen could have believed that all three sharp-edge blows were inflicted in the bedroom because (i) Sakarias had already admitted inflicting two blows, (ii) the amount of blood spatter was "more consistent" with three blows than two, and (iii) the angle of each wound was

the same. (RB 26.) However, as Ipsen himself admitted, there is no evidence that he believed, **at the time of the Sakarias trial**, that either the amount of blood or the angle of the wounds suggested that the pre-mortem chop wound was inflicted in the bedroom.

To the contrary, Ipsen testified at the evidentiary hearing that he **did not remember** if he actually had these reasons in mind at the time of the trial; he explained at the hearing that these were simply post-hoc explanations for what he **might** have been thinking at the time. (RTH 54.) Ipsen's caution was well-advised; a review of the actual trial record shows that the facts on which respondent now bases its assertion of "good faith" are -- in fact -- completely unsupported by the record.

Detective Pietrantoni was the only witness to discuss the blood spatter in the bedroom; he never testified that the amount of blood spatter was consistent with three blows rather than two. (Ex. B-2 at 887-895, 909-915.) He never testified that because of the amount of blood, he thought death occurred in the bedroom rather than the living room. (Id.) He never testified that the blood spatter showed the victim was alive in the back bedroom. (Id.) In fact, he could not even determine if the blood spatter was from the victim's body or the weapon itself. (Ex. B-2 at 915.)

Moreover, Ipsen would have had no reason to believe that the angle of the three chop wounds was the same because -- according to his own expert witness -- it was **not**

the same. Dr. Ribe testified that the massive-force, pre-mortem chop wound was a "horizontal chopping wound." In contrast, the non-hemorrhagic chop wound was "45 degrees off the horizontal." (Ex. 11 at 1394-95, 1396.) In other words, the wound angle was **not** the same. The state's suggestion that these facts support the conclusion that Ipsen acted in good faith ignores the record of both the evidentiary hearing and the trial.

Finally, the state suggests that the defense had a "fair opportunity" to question Dr. Ribe about the postmortem abrasion, and thus Ipsen cannot be faulted for misleading the jury. According to respondent, under the adversary system a prosecutor has no duty to introduce evidence that contravenes an aspect of his case. (RB 24.)

But this is not a case where Ipsen simply failed to present evidence that contravened his theory of the case. Here, at the Waidla trial Ipsen specifically relied on certain forensic evidence, and evidence of domination, to support his theory of the case. Based on that theory, he convinced the jury to sentence Waidla to die. At the Sakarias trial, Ipsen turned around and intentionally omitted that same evidence so he could argue a theory of the case squarely at odds with his earlier theory. While it may be true that prosecutors have no general duty to introduce evidence which contravenes their case, that bland observation does not justify Ipsen's conduct here.

To the contrary, prosecutors still have a duty to refrain from presenting false or misleading arguments. This duty is not discharged merely because defense counsel

knows, or should know, of evidence that rebuts the prosecutor's argument. (See Napue v. Illinois (1959) 360 U.S. 264, 269-270 [regardless of whether defense counsel should have known that a state witness testified falsely, a prosecutor still has a duty not to put on false testimony and to act when put on notice of "real possibility of false testimony"]; United States v. LaPage (9th Cir. 2000) 231 F.3d 488, 492 [prosecutor has a duty to correct false impression of facts regardless of whether defense counsel knows of the true facts or that jury may figure out the falsehood on its own].) The adversary system does not give prosecutors free reign to manipulate their evidentiary presentations and intentionally present theories which they know to be against the great weight of the evidence.

And that is exactly what happened here. Ipsen did not simply fail to present evidence that contravened some aspect of his case. He "deliberately refrained" from introducing certain evidence because "it was inconsistent with" the new theory of the killing that Ipsen presented at the Sakarias trial. That new theory was not only flatly inconsistent with the theory that Ipsen used to obtain a death judgment against Tauno Waidla months earlier, but Ipsen had "strong reason to believe" it was false precisely because it was inconsistent with the "great weight of the evidence." (Referee's Report

29.) Defense counsel's failure to spot Ipsen's duplicity is irrelevant to whether Ipsen acted in good faith.[1]

B. Judge Willhite's Findings Establish That Ipsen Knew His Argument In The Sakarias Trial Was False.

Respondent argues there is no "knowing falsity" because Ipsen did not make a false argument based on the introduction of false evidence. (RB at 24.) This is true; Ipsen made a false argument based on the **omission** of true evidence. Yet respondent

[1] It is true, of course, that defense counsel's failure to object to Ipsen's misconduct may itself violate the constitutional guarantee of effective assistance of counsel. Indeed, petitioner raised this very claim both on appeal and in his habeas petition. (See People v. Sakarias (2001) 22 Cal.4th 596, 636; In re Sakarias, S082299, Petition for Writ of Habeas Corpus at pp. 64-69.) And although this Court suggested that this issue should be presented and resolved in habeas proceedings, no evidentiary hearing was ordered in connection with this claim. (Compare People v. Sakarias, supra, 22 Cal.3d at pp. 636-637 with In re Sakarias, S082299, Order of January 15, 2003.) As Napue and LePage establish, however, the fact that a more diligent trial lawyer would have exposed Ipsen's misconduct at trial in no way immunizes that misconduct from review now.

claims that because Ipsen had "some reason" to believe the victim may have been alive in the bedroom, he could not have **known** with certainty that his argument to the Sakarias jury was false. (RB 25-26; Referee's Report 27.)

A prosecutor cannot avoid his ethical obligations so easily. A prosecutor "knows" evidence is false when, as here, he presents evidence despite "strong reason to believe" it is contrary to the "great weight of the evidence." And that is exactly what Judge Willhite found. (Referee's Report 27-29.) Absolute certainty is not required; trial evidence often cannot be proven true or false to a mathematical certainty. The loophole that respondent creates is fundamentally inconsistent with the prosecutor's "solemn obligation to present evidence only if it advances rather than impedes the search for truth and justice." (People v. Seaton, supra, 26 Cal.4th at p. 649.) Were respondent's view correct, a prosecutor could present perjured testimony, even if he had "strong reason to believe" it was false, so long as there was some shred of a reason to believe the contrary.

This is not the law. This Court stated in Seaton that a prosecutor should not present an expert's testimony if the prosecutor "seriously doubts" the accuracy of the testimony. (People v. Seaton, supra, 26 Cal.4th at p. 650.) Nor may a prosecutor argue inferences of fact he knows to be false "or has very strong reason to doubt." (United States v. Blueford, supra, 312 F.3d at p. 968.) Evidence which gives rise to a "strong possibility" that a witness would testify falsely triggers a duty to investigate before that

witness can be put on the stand. (Commonwealth of Northern Mariana Islands v. Bowie (9th Cir. 2001) 243 F.3d 1109, 1117.)

Miller v. Pate (1967) 386 U.S. 1 is instructive in this regard. In Miller, the prosecutor argued to the jury that stains on the defendant's shorts were blood. He based his argument on expert testimony presented at trial that the stains were blood. (Miller v. Pate, supra, 386 U.S. at pp. 3-4.) But, at the time the prosecutor also had access to a report that said the stains were not blood, but paint. (Id. at p. 6.) Even under these circumstances, the Supreme Court held that the prosecutor improperly made knowing use of false evidence. Thus, Miller illustrates that a prosecutor may "know" an argument is false even where there is **some** evidence to support the argument.

In short, there is "knowing falsity" whenever a prosecutor argues a factual inference when he knows that inference is contradicted by the "great weight of the evidence." That is exactly what happened here.

III. GIVEN THE PRESENCE OF FOUR UNDISPUTED MITIGATING FACTORS, THE OBJECTIVE RECORD OF JURY DELIBERATIONS REFLECTING A CLOSE CASE, AND THE RELIANCE IPSEN PLACED ON THE FALSE EVIDENCE, A NEW PENALTY PHASE IS REQUIRED.

Finally, respondent argues any error is harmless. Respondent summarizes the circumstances of the crime and concludes that "Sakarias would have received the same penalty even if the prosecutor had not attributed the chopping wounds to him during argument." (RB 29.) Petitioner has largely anticipated this argument. (Petitioner Sakarias's Brief on the Merits at 31-34.) Only two additional points need be made.

First, respondent omits important facts. In assessing prejudice, the test is not whether a hypothetical reasonable jury would have been affected by the error, but whether the verdict of the jury in this case was influenced by the error. "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in **this** trial was surely unattributable to the error." (Sullivan v. Louisiana (1993) 508 U.S. 275, 279.)

Here, objective facts (never mentioned by respondent) show the closeness of the case. The jury deliberated for nearly 12 hours over the course of three court days. (CT 608-611, 627; See People v. Cardenas (1982) 31 Cal.3d 897, 907 [twelve-hour

deliberation was a "graphic demonstration of the closeness of this case"]; People v. Rucker (1980) 26 Cal.3d 368, 391 [nine-hour jury deliberation shows close case]; People v. Woodard (1979) 23 Cal.3d 329, 341 [six-hour deliberation].)

Further, the jurors themselves said the case was so close they could not reach a decision. During the deliberations, the jury returned to the courtroom and said it was unable to reach a verdict as to whether Sakarias should live or die. (CT 608-611, 627.) Again, this evidences a close. (See, e.g., People v. Sheldon (1989) 48 Cal.3d 935, 965 [Mosk, J., concurring and dissenting].)

Second, respondent ignores the significance of the pre-mortem chop wound to the prosecutor's argument. The significance placed on this fact is particularly ironic in this case.

Shortly before trial, Ipsen recommended that his office **not** seek the death penalty against Sakarias. Ipsen sent a memorandum to his superiors that explained why Sakarias was less culpable than Waidla:

> "The defendant's confession, corroborated by physical evidence, indicates that he wielded the knife, while Waidla used the hatchet. It is my opinion that the defendant became involved in the attack at the command of Waidla after the victim was rendered unconscious by Waidla's hatchet blows to the head."

(RTH 145-147; Ex. I.) Further, Ipsen acknowledged that "[t]here is substantial evidence that the defendant acted under the domination of Waidla." (Ex. I.)

Because Ipsen himself was unpersuaded that the circumstances supported the death penalty, he set out to change those circumstances. Thus, at the Sakarias trial he argued that Sakarias did **not** act under the domination of Waidla. (RTS 3061-3062.) Directly contradicting his pretrial views (as expressed in his memorandum), he told the jury there was "no evidence of domination." (Ex. 7 at 2440.) Further, he argued that Sakarias **did** inflict the pre-mortem chop wound, which Dr. Ribe described as a blow of "massive force," the most violent of all the blows, and the blow that Ipsen said "finally end[ed] her life." (Ex. 6 at 1521-1522; Ex. 7 at 2440, 2447.) As Judge Willhite found, "Ipsen obviously considered infliction of the chopping wounds, especially the hemorrhagic chop wound, to be singularly important in showing each defendant's depravity." (Referee's Report at 26.)

Considering the emphasis placed on the issues of domination and the pre-mortem chop wound, the substantial mitigation evidence, and the objective indicia of a close case, there is far more than a "reasonable likelihood" the prosecutor's misconduct affected the judgment of the jury. (In re Jackson (1992) 3 Cal.4th 578, 597; United States v. Agurs (1976) 427 U.S. 97, 103.) Reversal of the judgment of death is required.

CONCLUSION

The state concedes Ipsen presented testimony and argument in the Sakarias trial which was inconsistent with the testimony and argument he presented in the Waidla trial. It concedes Ipsen did so deliberately in order to maximize the portrayal of Sakarias's culpability. It concedes he deliberately altered his evidentiary presentation in the Sakarias trial for the same reason. And it concedes that Ipsen had "strong reason to believe" his argument to the Sakarias jury was false because it was inconsistent with "the great weight of the evidence."

Despite these concessions, respondent argues that Ipsen acted in "good faith." If that is so, then "good faith" has no meaning. Relief is required in this case.

Dated: _____

Respectfully submitted,

CLIFF GARDNER
ROBERT DERHAM

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